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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-437
MOBIL OIL CORPORATION, *Petitioner*
v.
FEDERAL POWER COMMISSION

No. 73-457
PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Petitioner*
v.
FEDERAL POWER COMMISSION

No. 73-464
MUNICIPAL DISTRIBUTORS GROUP, *Petitioner*
v.
FEDERAL POWER COMMISSION

MOTION OF SHELL OIL COMPANY TO MR. JUSTICE WILLIAM O. DOUGLAS REQUESTING THAT HE RECUSE HIMSELF FROM PARTICIPATION IN THE CAPTIONED CASE; OR, IN THE ALTERNATIVE, TO THE COURT URGING THAT IT DISQUALIFY MR. JUSTICE DOUGLAS FROM PARTICIPATING IN THE CAPTIONED CASE

OLIVER L. STONE
THOMAS G. JOHNSON
One Shell Plaza
P. O. Box 2463
Houston, Texas 77001

WILLIAM SIMON
Howrey, Simon, Baker & Murchison
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Attorneys for Shell Oil Company

February 8, 1974
Houston, Texas

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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Comes now Shell Oil Company ("Shell") pursuant to Rule 35 of this Court, and most respectfully requests

Mr. Justice William O. Douglas to recuse himself from the captioned case and withdraw from participation therein. Should Mr. Justice Douglas decline so to recuse and withdraw, Shell most respectfully moves the Court to disqualify Mr. Justice Douglas from participation in this case.

The grounds for this Motion are that, according to press and news releases, Mr. Justice Douglas, in a public address delivered at Oxford, Mississippi, on January 28, 1974, expressed an opinion on questions of law and fact pending before this Court in the captioned case, prior to the submission of briefs and argument on the merits. Shell, a party respondent in support of the decision of the Federal Power Commission and the United States Court of Appeals for the Fifth Circuit, makes this Motion with the utmost reluctance, and in the light of the rule that questions of disqualification are deemed to be waived unless timely raised, see *Gilligan, Will & Co. v. S.E.C.*, 267 F.2d 461 (2nd Cir., 1959), cert. denied, 361 U.S. 896, 4 L.Ed.2d 152, 80 S.Ct. 200 (1959); *Safeway Stores, Inc. v. Federal Trade Commission*, 366 F.2d 795 (9th Cir., 1966).

I. Public Statements Attributed To Mr. Justice William O. Douglas

On January 28, 1974, Mr. Justice William O. Douglas made an address to law students and other undergraduates at the University of Mississippi at Oxford, Mississippi.

Mr. Justice Douglas' address was attended by a local newspaper reporter, Charles Daniel Goodgame, who is also a "stringer" for the Associated Press. This reporter

drafted a wire, which was sent out over the Associated Press and United Press wire services to approximately 2,700 daily newspapers and radio and television stations, which reads in part as follows:

> "(OXFORD, MISSISSIPPI) — U-S SUPREME COURT JUSTICE WILLIAM O. DOUGLAS HAS CHARGED THE OIL COMPANIES WITH CREATING THE ENERGY CRISIS FOR THEIR OWN PROFIT. AND DOUGLAS SAYS THEY HAD THE COOPERATION OF GOVERNMENTAL BUREAUCRACY. DOUGLAS EXPRESSED HIS VIEWS IN AN ADDRESS TO LAW STUDENTS AND OTHER UNDERGRADUATES AT THE UNIVERSITY OF MISSISSIPPI IN OXFORD.
>
> THE 75-YEAR-OLD JURIST SAID 'THE OIL INDUSTRY KEEPS THE SUPPLY OF OIL AND GAS LOW ENOUGH TO BOOST PRICES . . .' HE ADDED THAT THE GOVERNMENT CO-OPERATES WITH THE BIG CORPORATIONS INSTEAD OF PROTECTING THE PEOPLE. THE REASON, DOUGLAS DECLARED, IS THAT IT HAS BECOME A 'GOVERNMENT OF CORPORATIONS, BY CORPORATIONS AND FOR CORPORATIONS.' "

An Affidavit of the reporter is attached hereto as Appendix A. In Appendix B appear two "follow-up" wires of the Associated Press by the same reporter in which Mr. Justice Douglas is quoted as saying "the problem is one of a fuel monopoly" and articles appearing in the Washington Post and The New York Times on January 29, 1974 based on the Associated Press wire.

It is Shell's position that, if the foregoing statements attributed to Mr. Justice Douglas were in fact made by him, he has evidenced a prejudgment of the crucial issue in this case, and a disinterested person, upon hearing or reading about the statements made by Mr. Justice Douglas would conclude that he has prejudged such issue. As is developed more fully *infra*, the basic and crucial issue is whether a gas shortage exists, the reasons for the shortage, and the appropriate action to be taken by the Federal Power Commission in response to the shortage. In stating that the oil companies had the "cooperation of governmental bureaucracy", and that "the government has become a government of corporations, by corporations, and for corporations", it is apparent that Mr. Justice Douglas has concluded that the Federal Power Commission acted in cooperation with the corporations involved in this case rather than on the basis of the record before it. The statements attributed to Mr. Justice Douglas, if in fact made by him, reflect such a hostility toward corporations engaged in the oil and gas business, and imputes such wrongdoing to them that, we submit, it would be highly improper for Mr. Justice Douglas to participate in this case.

II. The Basic Issue In The Captioned Case

In its first decision in the *Southern Louisiana Area Rate Proceeding*, 40 FPC 530, the Federal Power *Commission* established area rates for gas producers in the Southern Louisiana Area based almost entirely on a cost-of-service calculation following utility principles, with only minimal consideration of "non-cost" factors. On appeal, the United States Court of Appeals for the Fifth Circuit gave qualified affirmance to the Commission's action but criticized

the Commission's failure to take into consideration the impact of its price structure on gas supply, and authorized the Commission to reconsider its decision if it found a gas shortage to exist and further found that its rate structure was having an adverse impact on that shortage, *Austral Oil Co. v. Federal Power Commission,* 428 F.2d 407 (5th Cir., 1970), cert. den. *sub nom. Municipal Distributors Group v. Federal Power Commission,* 400 U.S. 950 (1970).

The Commission then reopened the record, heard additional evidence on the increasing gas shortage which in the Commission's words then amounted to a "crisis", obtained additional cost evidence, and considered a settlement agreement proposed by the substantial preponderance of the parties to the case. After a full hearing and briefs from all parties, the Commission withdrew its previous rate structure and established new area rates for producer sales in the Southern Louisiana Area, 46 FPC 86. The case was again appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed the Commission in all respects, *Placid Oil Company v. Federal Power Commission,* 483 F.2d 880.

The Court of Appeals decision in the *Placid* case, *supra,* is the subject of Petitions for Certiorari filed by the Public Service Commission for the State of New York in Case No. 73-457, and by the Municipal Distributors Group in Case No. 73-464, which challenged the power of the Commission to base its decision in part on a finding that a gas shortage exists, and to take this factor into consideration in the determination of producer rates. By Order issued January 14, 1974, this Court granted certiorari and consolidated the captioned cases.

III. The Right Of A Hearing Before An Impartial Tribunal Is Basic To Due Process

The right of a party litigant to a fair hearing before an unbiased and impartial tribunal is basic in Anglo-Saxon jurisprudence. This Court laid down a strict standard in *In Re Murchison*, 349 U.S. 133, 99 L.Ed. 942, 75 S.Ct. 623 (1955), stating:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' Tumey v. Ohio, 273 U.S. 510, 532, 71 L.Ed. 749, 758, 47 S.Ct. 437, 50 ALR 1243. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 99 L.Ed. 11, 75 S.Ct. 11." (349 U.S. at 136)[1]

This Court held in *Berger v. United States*, 255 U.S. 22, 65 L.Ed. 481, 41 S.Ct. 230 (1921), that a public

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1. Discussed and followed in *Amos Treat & Co., Inc. v. S.E.C.*, 306 F.2d 260 (D.C. Cir., 1962).

statement by the trial judge reflecting prejudice against a class of which the defendant was a member, required reversal of the defendant's conviction in the trial over which the judge presided. Similarly, *Tumey v. Ohio*, 273 U.S. 510, 71 L.Ed. 749, 47 S.Ct. 437 (1926) was a case where this Court found that a mayor, who was authorized under the laws of Ohio to preside over cases involving violations of the Prohibition Law, could not be impartial where he receives fees or costs only if the defendant were convicted. Even the conduct of a judge and statements about one of the attorneys in the course of the trial may be sufficient to constitute bias and lack of impartiality, *Offutt v. United States*, 348 U.S. 11, 99 L.Ed. 11, 75 S. Ct. 11 (1954); *Peckham v. United States*, 210 F.2d 693, 702 (D.C. Cir., 1953).

In *United States v. Grinnell Corp.*, 384 U.S. 563, 16 L.Ed.2d 778, 86 S.Ct. 1698 (1966), this Court noted:

> "The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." (384 U.S. at 583)

This test is met here, as no briefs have yet been filed or argument heard on these issues.

In *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 98 L.Ed. 681, 74 S.Ct. 499 (1953), this Court remanded a case to the Board of Immigration because the Attorney General had, prior to a hearing announced at a press conference that he had prepared a list of "unsavory characters" and that the issuance of the list amounted to a prejudgment of petitioner's case.

It is true that this Court held in *United States v. Morgan*, 313 U.S. 409, 85 L.Ed. 1429, 61 S.Ct. 999 (1940) that the Secretary of Agriculture was not disqualified from determining rates where he had criticized the previous Supreme Court remand on the same issues, where he stated he had made no prejudgment of the rates to be fixed, and where no other person had the legal authority to make the rate order. The Court in *Morgan* was influenced by the "rule of necessity"[2] where judges, although otherwise disqualified, may be required to serve where there is no other tribunal authorized by law to resolve the issue. Thus, in *Evans v. Gore*, 253 U.S. 245, 64 L.Ed. 887, 40 S.Ct. 550 (1920), this Court ruled on the issue whether the income tax should be applied to judges' salaries, even though the judges necessarily had a financial interest in the outcome, because no other court could decide the question.[3]

The danger of making public statements indicating a predisposition on the issues before a tribunal was discussed by the District of Columbia Circuit in *Cinderella Career and Finishing Schools v. Federal Trade Commission*, 425 F.2d 583 (1970) in the following terms:

> "Conduct such as this may have the effect of entrenching a Commissioner in a position which he

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2. Davis, Administrative Law, § 12.04, Vol. 2, p. 162, *et seq.*

3. In *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 92 L.Ed. 1010, 68 S.Ct. 793 (1947), this Court sustained the decision of the Federal Trade Commission against alleged bias and prejudgment disclosed by prior reports of the FTC to Congress on the grounds that the FTC had a duty to report to Congress and a duty to decide the issue, and if it were disqualified no other legal authority could carry out that duty, 330 U.S. at 701.

> has publicly stated, making it difficult, if not impossible, for him to reach a different conclusion in the event he deems it necessary to do so after consideration of the record." (425 F.2d at 590)

In that case the D. C. Circuit held that statements by a Federal Trade Commissioner in a speech before the Government Relations Workshop of the National Newspaper Association evidencing prejudgment of the issues in a case, were grounds for reversal of an FTC decision in which this Commissioner participated. The Court of Appeals reaffirmed the test for disqualification it had earlier laid down in *Texaco Inc. v. Federal Trade Commission,*[4] as follows:

> "The test for disqualification has been succinctly stated as being whether 'a disinterested observer may conclude that [the agency] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.'" (425 F.2d at 591)

The *Texaco* case, *supra,* involved statements made by the Chairman of the Federal Trade Commission in a speech before the National Congress of Petroleum Retailers, Inc. while the case was pending before the trial examiner. The Court found that:

> "[A] disinterested reader of Chairman Dixon's speech could hardly fail to conclude that he had in some measure decided in advance that Texaco had violated the Act." (336 F.2d at 760)

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4. 336 F.2d 754 (D.C. Cir., 1964), vacated and remanded on other grounds, 381 U.S. 739, 14 L.Ed.2d 714, 85 S.Ct. 1798 (1965).

The court concluded that the participation of the Chairman in the hearing amounted under the circumstances to a denial of due process, invalidating the Commission's order.

In *Pillsbury Company v. Federal Trade Commission,* 354 F.2d 952 (5th Cir., 1966), the Court of Appeals analyzed the foregoing cases in holding that questioning of members of the Federal Trade Commission by members of the United States Senate in a Senate Committee hearing about the merits of the case prejudiced the rights of the parties litigant.

The Court of Appeals further held that, in addition to its adverse effect on the rights of the litigants, the examination by the Senate Subcommittee had an adverse effect on the Commission itself, by sacrificing "the appearance of impartiality—the *sine qua non* of American *judicial* justice" (354 F.2d at 964). The court then stated:

> "What we do is to preserve the integrity of the judicial aspect of the administrative process." (354 F.2d at 964)

Similarly, in *Gilligan, Will & Co. v. S.E.C., supra,* the Court of Appeals voiced its concern for the Commission's reputation, which the court felt to be compromised by a press release indicating the issues had been prejudged. The Court said:

> "[T]he Commission's reputation for objectivity and impartiality is opened to challenge by the adoption of a procedure from which a disinterested observer may conclude that it has in some measure adjudged the

facts as well as the law of a particular case in advance of hearing it." (267 F.2d 461, 468-69)

It is true, that unlike United States District Judges[5] and Administrative Judges or Commissioners[6] there is no statute or rule dealing with disqualification of a United States Supreme Court Justice on the grounds that he has prejudged the issues of the case.[7] Nevertheless, the need to preserve this Court's long and distinguished reputation for objectivity, free from any possibility of a suggestion of prejudgment or bias, is much stronger than would be the case for any trial court or administrative agency. The higher the tribunal, the greater the need for high and unimpeachable standards of impartiality. Therefore, for this Court, none but the highest standard will suffice.

IV. Conclusion

WHEREFORE, Shell Oil Company most respectfully requests that Mr. Justice William O. Douglas recuse himself from the captioned case and withdraw from participation therein. Should Mr. Justice Douglas refuse to so recuse and withdraw, Shell Oil Company most respect-

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5. 63 Stat. 99, 28 U.S.C.A. 144; 62 Stat. 908, 28 U.S.C.A. 455; *Rapp v. Van Dusen*, 350 F.2d 806 (3rd Cir., 1965); *Texaco Inc. v. Chandler*, 354 F.2d 665 (10th Cir., 1965); cert. den. 383 U.S. 936, 15 L.Ed.2d 853, 86 S.Ct. 1066 (1966).

6. Administrative Procedure Act, § 7(a), 5 U.S.C.A. 556.

7. See Comment by Justice Jackson in *Jewel Ridge Coal Corporation v. Local No. 6167, United Mine Workers*, 325 U.S. 897, 89 L. Ed. 2007, 65 S.Ct. 1550 (1945).

fully moves this Court to disqualify him from such participation.

Respectfully submitted,

OLIVER L. STONE
THOMAS G. JOHNSON
One Shell Plaza
P. O. Box 2463
Houston, Texas 77001

WILLIAM SIMON
HOWREY, SIMON, BAKER
& MURCHISON
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Attorneys for Shell Oil Company

By /s/ THOMAS G. JOHNSON

February 8, 1974
Houston, Texas

APPENDIX A

State of Mississippi
County of Lafayette

AFFIDAVIT OF CHARLES DANIEL GOODGAME

Personally appeared before me this day within named Charles Daniel Goodgame who on oath did make the following affidavit:

My name is Charles Daniel Goodgame; I am a student at the University of Mississippi in Oxford, Lafayette County, Mississippi. On Monday, January 28, 1974, at Fulton Chapel on the University of Mississippi campus, at 2:00 P.M., Mr. Justice William O. Douglass, under the sponsorship of the University of Mississippi School of Law Speakers Bureau addressed an open forum of some 1,300 students and faculty of the University and invited guests. Among the re marks made by Justice Douglass were the following:

"The oil industry keeps the supply of oil and gas low enough to boost prices and make sure that all other energy sources are on the bottom."

"The energy crisis isn't a temporary thing to be resolved by the cleverness of the Secretary of State; we need long-range solutions and the oil industry is blocking progress toward those."

He said the energy crisis is "largely self-created". He said the problem is a "fuel monopoly".

"Ours has become a government of the corporations, by the corporations, for the corporations." "It used to be my country right or wrong, now it's my corporation right or wrong."

"Oil companies insure that solar energy and hydrogen fusion research are poorly funded."

I am the Executive Assistant to the DG Editor of the DAILY MISSISSIPPIAN, the campus daily newspaper and heard Mr. Justice Douglass' speech and reported it to the press.

And further affiant sayeth not.

/s/ CHARLES DANIEL GOODGAME
Charles Daniel Goodgame

SWORN TO AND SUBSCRIBED before me this the 5th day of February, 1974.

/s/ BETTY H. GALLOWAY
Notary Public

My commission expires Mar. 26, 1974.

(Seal)

APPENDIX B

(OXFORD, MISSISSIPPI)—SUPREME COURT JUSTICE WILLIAM O. DOUGLAS HAS SOME SHARP WORDS FOR THE GOVERNMENT AND ABOUT THE ENERGY CRISIS. DOUGLAS TOLD LAW STUDENTS AT OXFORD, MISSISSIPPI THAT THE OIL COMPANIES CREATED THE ENERGY CRISIS FOR THEIR OWN PROFIT. AND DOUGLAS SAYS THEY DID THIS WITH THE COOPERATION OF THE GOVERNMENT.

CHARGING THE CRISIS IS LARGELY SELF-CREATED, HE SAYS THE GOVERNMENT COOPERATES WITH THE BIG CORPORATIONS RATHER THAN PROTECTING THE PEOPLE. DOUGLAS SAYS THAT'S BECAUSE THE GOVERNMENT HAS BECOME ONE THAT IS OF . . . BY . . . AND FOR BIG CORPORATIONS.

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18TH SUMMARY-TAKE 2

(OXFORD, MISSISSIPPI)—U-S SUPREME COURT JUSTICE WILLIAM O. DOUGLAS HAS ACCUSED THE OIL COMPANIES OF CREATING THE ENERGY CRISIS FOR THEIR OWN PROFIT WITH THE COOPERATION OF GOVERNMENT BUREAUCRACY. IN A SPEECH AT THE UNIVERSITY OF MISSISSIPPI TODAY, DOUGLAS CHARGED THE ENERGY CRISIS IS LARGELY SELF-CREATED.

THE JUSTICE SAID THE PROBLEM IS ONE OF A FUEL MONOPOLY. HE SAID THE OIL INDUSTRY KEEPS THE SUPPLY OF OIL AND GAS LOW ENOUGH TO BOOST PRICES AND MAKE SURE ALL OTHER ENERGY SOURCES ARE ON THE BOTTOM.

Washington Post—1/29/74

OIL INDUSTRY PROFITEERING, DOUGLAS SAYS

OXFORD, Miss. Jan. 29 (UPI)—Supreme Court Justice William O. Douglas today accused the petroleum industry of profiteering on the fuel shortage.

Douglas, addressing 1,300 University of Mississippi students, also criticized what he said was government spying.

He said the energy crisis is "largely self-created." Our problem is a fuel monopoly.

"The oil industry keeps the supply of oil and gas low enough to boost prices and makes sure all other energy sources are on the bottom." He said the oil interests are blocking progress toward long-term solutions.

Douglas said wiretapping and bugging have become almost commonplace in Washington and that the late Robert F. Kennedy "talked for about 20 minutes to a supposedly hidden mike once."

Mrs. Douglas and I do that a lot at home, too," he said. "We like to give them something to listen to."

New York Times—1/29/74

DOUGLAS SCORES COMPANIES ON CRISIS

OXFORD, Miss., Jan. 28 (AP)—Supreme Court Justice William O. Douglas accused the oil companies today of creating the energy crisis for their own profit, with the cooperation of governmental bureaucracy. The 75-year-old jurist told 1,300 law students and other undergraduates at the University of Mississippi that the "energy crisis is largely self-created." "Our problem is a fuel monopoly. The oil industry keeps the supply of oil and gas low enough to boost prices and make sure all other energy sources are on the bottom," he said.